84-82

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

WILLIAM ROBERT PARKER,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Petitioner was denied Due Process and Equal Protection of the law, as guaranteed him under the Fifth and Fourteenth Amendments to the United States Constitution, by the failure or refusal of the Texas Court of Appeals for the Sixth Supreme Judicial District to set aside a second jury's *retrospective* finding of competency to stand trial, where the evidence at the *retrospective* competency hearing overwhelmingly preponderated in favor of Petitioner, and was such that no rational trier of fact could have found against defendant on that issue.

II. Whether Petitioner was denied Due Process and Equal Protection of the law as guaranteed him under the Fifth and Fourteenth Amendments to the United States Constitution when, at a *retrospective* competency hearing before a second jury, the state's attorney injected before the jury the notion that the issue of Petitioner's competence was being raised only to avoid the life sentence he received for being convicted of murder.

LIST OF PARTIES BELOW

1. The State of Texas
2. William Robert Parker

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WILLIAM ROBERT PARKER,
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THE STATE OF TEXAS,
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PETITION FOR WRIT OF CERTIORARI

PRAYER

The Petitioner, WILLIAM ROBERT PARKER, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the Texas Court of Criminal Appeals, the Texas criminal court of last resort, issued on the 9th day of May, 1984.

OPINIONS BELOW

A copy of the opinion of the Texas Court of Appeals for the Sixth Supreme Judicial District is attached hereto and incorporated herein for all purposes as "Appendix A." Following the decision by the aforementioned intermediary court of appeals, Petitioner sought review of that

opinion by filing a Petition for Discretionary Review in the Texas Court of Criminal Appeals, the Texas appellate court of last resort. On May 9, 1984, the Clerk of the Texas Court of Criminal Appeals at Austin, Texas, issued official notice that Petitioner's application for Discretionary Review had been refused. A true and correct copy of that order of refusal is attached hereto and incorporated herein for all purposes as "Appendix B."

JURISDICTION

In light of the May 9, 1984, refusal by the Texas Court of Criminal Appeals to entertain Petitioner's Application for Discretionary Review of the intermediary court's opinion, jurisdiction of the Supreme Court is invoked under Title 28, United States Code, § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Five:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment at a grand jury, except in cases arising in the land or naval forces, or in the militia, when in the actual service in time of war or public danger; Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment Fourteen:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

STATEMENT OF THE CASE

On the 19th day of November, 1980, Petitioner, WILLIAM ROBERT PARKER, was indicted for the offense of murder in Panola County, Texas, the indictment being returned to the 123rd Judicial District Court in said county. After hearing numerous pretrial motions, the cause proceeded to trial on February 23, 1981. After two days in trial, Petitioner's trial counsel openly called into question Petitioner's competence to stand and continue the trial. Specifically, Petitioner's trial counsel reported that Petitioner had been having hallucinations during the trial.

Over the weekend recess, Petitioner was examined by a psychiatrist, who shared counsel's opinion that Petitioner was incompetent and unable to assist in his defense because he did not have sufficient ability to consult with his lawyer with a reasonable degree of rational understanding, and further that he has no rational or factual understanding of the proceedings against him.

On March 2, 1981, Petitioner's trial counsel informed the trial court that Petitioner was incompetent and unable to proceed with the evidence and, at the same time, be accorded Due Process and equal protection of the law. The trial court, however, refused Petitioner's strenuous motion for mistrial, as well as counsel's request for an

immediate hearing before another jury in order to determine Petitioner's competency to stand trial.

On March 4, 1981, after both sides had rested, the jury returned a verdict that Petitioner was guilty of murder as charged. Following the punishment hearing on the next day, the jury returned a verdict of confinement in the Texas Department of Corrections for life. The trial court did not, however, sentence Petitioner. Instead, the trial court postponed sentencing until a *retrospective* competency hearing before a second jury could be had. In the interim, Petitioner was examined extensively by private and public physicians. Though the evidence overwhelming preponderated in favor of finding Petitioner incompetent to stand trial, the jury returned a verdict contrary to the evidence, and accordingly, after the second jury's verdict was received, the trial court sentenced Petitioner to life imprisonment.

Petitioner timely and properly gave notice of appeal to the intermediary Texas Court of Appeals for the Sixth Supreme Judicial District, sitting in Texarkana, Texas. In that appeal Petitioner contended that (1) the second jury's finding that Petitioner was competent to stand trial was against the great weight and preponderance of the evidence; (2) the trial court erred in failing to grant a mistrial when Petitioner's incompetence was made known; (3) the prosecutor made improper remarks before the jury to the effect that Petitioner had been convicted of murder and had received a life sentence and that such was a motive for "fainting" schizophrenia; and (4) the trial court erroneously submitted the competency issue to the jury, since the inquiry was not confined to present competency and necessarily, in tandem with the prosecutor's ill-advised remarks, made the jury aware that

Petitioner had just been tried, convicted and had received a substantial punishment.

The intermediary court, noting that, "A great amount of evidence was adduced on the question of competency," wrote that the evidence was "highly conflicting" and, somehow, concluded:

> "We cannot say the finding of competency is against the great weight and preponderance of the evidence.

Petitioner agrees with the intermediary Appellate Court's statement that there was an abundance of evidence. The evidence, however, consisted of nine doctors, seven of whom were of the opinion that Petitioner was a paranoid schizophrenic and was not competent to stand trial. The other two members of the Rusk State Hospital, where Petitioner was temporarily incarcerated, while offering their expected conclusions of competency, candidly admitted that they were unaware that Petitioner had been diagnosed as having paranoid schizophrenia in 1975 (five years prior to his indictment), and further, that the results of testing, such as the MMPI (Minnesota Multiphaseic Personality Inventory, a diagnostic test), would support the other seven doctors' opinion of incompetency. In fact, the State's expert witnesses admitted that eighty percent (80%) of the people that had profiles such as Petitioner exhibited by the test were properly diagnosed as being psychotic.

As to the other issue raised herein, the intermediary Texas Court of Appeals somehow held that, while the guilt or innocence of an accused should not have been made an issue before the jury, the jury was not prejudiced by it in this case. Nothing in the record supports that conclusion.

STATEMENT OF FACTS

Petitioner was charged with causing the death of his brother-in-law, Shane Caskey. Specifically, there was evidence that Petitioner had eloped with the deceased's sister when the latter was sixteen years of age and that, since then, there had been hostilities between the deceased and the deceased's father (Petitioner's father-in-law, Boyd Caskey).

On the day in question, Petitioner, his wife, and a man named James Chambers, had gone to Shreveport, Louisiana, to visit with Petitioner's father, who had been hospitalized there. Petitioner's infant child had been left with his in-laws (the Caskeys), who also lived in Panola County, Texas, where Petitioner lived. When Petitioner returned to the Caskeys' house later that evening, his wife went inside the house but did not return with their child. Instead, Boyd Caskey (Petitioner's father-in-law) came to the door and told Petitioner that the two were better off without him. An argument ensued, whereupon Petitioner left the Caskey home.

Later that night, the Caskeys heard Petitioner outside their house. Both Caskeys (the father-in-law and the deceased) ran out of the house in separate directions with loaded shotguns. Boyd Caskey heard his son, the deceased yell, "Billy Bob (Petitioner) you son-of-a-bitch," whereupon a shot was fired by someone. Mr. Caskey then ran to where his son was and discovered that he had been shot. Boyd Caskey then hailed some gunfire at Petitioner as the latter was leaving in his pickup truck.

Petitioner presented evidence that he had gone to the Caskey house for the purpose of retrieving his wife and child and that he shot his brother-in-law in self-defense after being confronted with a loaded shotgun.

REASONS FOR ALLOWANCE OF THE WRIT

The integrity of our notion of Due Process and equal protection of the laws is here at stake. At a bare minimum when the State takes the liberty of a citizen away from him, the law requires that the citizen possess the requisite mental competence so that he can not only understand the allegations against him, but, perhaps even more significantly, assist his lawyer in his own defense. This right to assistance of and to counsel becomes even more significant as prosecution facts are developing during the course of a trial. It is then when rational cooperation and exchange of facts and ideas are most needed. In the case at bar, Petitioner sat helplessly and impotently aside his trial counsel as the State was slowly but surely stripping him of his freedom.

When a state gets a conviction against a citizen accused who is not legally competent to stand trial, Due Process and equal protection of the law is offended. *Bishop v. United States,* 350 U.S. 961, 100 L.Ed. 835, 76 S.Ct. 440 (1956); *Pate v. Robinson,* 383 U.S. 375, 15 L.Ed. 2d 815, 86 S.Ct. 836 (1966).

The pertinent aspects of the procedure in the State of Texas appear under Article 46.02, Vernon's Annotated Code of Criminal Procedure, as follows:

Incompetency to Stand Trial.

"Sec. 1.

(a) A person is incompetent to stand trial if he does not have:

(1) Sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding; or

(2) A rational as well as factual understanding of the proceedings against him.

(b) A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence.

Raising the Issue of Incompetency to Stand Trial

Sec. 2.

(a) The issue of the defendant's incompetency to stand trial shall be determined in advance of the trial on the merits if the court determines there is evidence to support a finding of incompetency to stand trial on its own motion or on written motion by the defendant or his counsel filed prior to the date set for trial on the merits asserting that the defendant is incompetent to stand trial.

(b) If during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court must conduct a hearing out of the presence of the jury to determine whether or not there is evidence to support a finding of incompetency to stand trial.

* * *

Incompetency Hearing

Sec. 4.

(a) If the court determines that there is evidence to support a finding of incompetency to stand trial, a jury shall be empaneled to determine the defendant's competency to stand trial. This determination shall be made by a jury that has not been selected to determine the guilt or innocence of the defendant. . . ."

(c) If the issue of incompetency to stand trial is raised other than by written motion in advance of trial pursuant to subsection (a) of Sec. 2 of this article and the court determines that there is evidence to support a finding of incompetency to stand trial, the court shall set the issue for a determination at any time prior to the sentencing of the defendant. If the competency hearing is delayed until after a verdict on the guilt or innocence of the defendant is returned, the competency hearing shall be set as soon thereafter as reasonably possible, but a competency hearing may be held only if the verdict in the trial on the merits is 'guilty.' If the defendant is found incompetent to stand trial after the beginning of the trial on the merits, the court shall declare a mistrial in the trial on the merits. A subsequent trial and conviction of the defendant for the same offense is not barred and jeopardy does not attach by reason of a mistrial under this section. . . ."

The raising of the competency issue before the trial court

As noted above, Petitioner's counsel on February 27, 1981, approached the trial judge and made the following statement:

". . . I need to bring this to the court's attention, that my client just told me that yesterday shortly before lunch . . . he was in the men's room in the hallway . . . he told me, he said he heard Your Honor speaking to the jury in the jury room and that Your Honor asked the question of the jury whether the jury had any sort of discussion or consideration of punishment. Billy Bob [Petitioner] said he heard no response from the jury and then heard Your Honor say, 'Well, you should now begin considering the issue of punishment.'. . ."
"R.VI-1006"

Over the weekend recess, Petitioner was seen by a psychiatrist. There was evidence that Petitioner had been having auditory hallucinations. "R.VI-108-1017."

Defense counsel further requested that a Dr. Merck, a psychiatrist who had evaluated Petitioner back in 1979 (prior to indictment), be allowed to re-evaluate Petitioner.

In the face of the predicament, the State's attorney requested that the trial proceed and, if a competency hearing were required under Texas procedure, that it be conducted following a verdict of guilty but prior to sentencing.

Prior to the conclusion of the guilt-innocence phase of the trial, by way of a bill of exception, Petitioner's counsel offered the opinion of Dr. Merck to the effect that Petitioner was incompetent to stand trial. Dr. Merck further testified that, because of the psychotic nature of Petitioner's mental status and his "delusional system," that he could not properly respond to questions and, further, that he did not have a rational as well as factual understanding of the proceedings against him. "R.VIII-1369-1371" The clear inference was that, had Petitioner been tried subsequently when he was competent, that he would have been called to testify in his own behalf; as it was, however, there was no telling what Petitioner might say before the jury in response to any given question. Accordingly, he was not called to testify in his own behalf.

Following Dr. Merck's testimony, Petitioner's motion for a mistrial was denied and the trial proceeded on, irrespective of Petitioner's delusional, incompetent state of mind.

The evidence at the competency hearing, some six months later

The competency hearing began on September 21, 1981, and concluded on October 1, 1981. A summary of the pertinent evidence offered by both sides is included and incorporated herein for all purposes under "Appendix C."

In *Dusky v. United States,* 362 U.S. 402, 4 L.Ed.2d 824, 80 S.Ct. 788 (1960), the Supreme Court reversed a finding of competency based upon insufficiency of the record to support that conclusion.

Moreover, in *Jackson v. Virginia,* 443 U.S. 307, 61 L.Ed.2d 590, 99 S.Ct. 2781 (1979), the duty a federal court has to see that due process of law is accorded to all citizens was highlighted as follows:

> "A federal court has the duty to assess the historical facts when it is called upon to apply a constitutional standard to a conviction obtained in a state court. For example, on direct review of a state court conviction, where the claim is made that an involuntary confession was used against the defendant, this court reviews the facts to determine whether the confession was wrongfully admitted in federal habeas corpus proceedings [citing additional cases]. '
>
> "After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt."

* * *

> " . . . The relevant question is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 318, 319.

Notwithstanding *Jackson's* mindfulness of Due Process, there exists confusion in the State of Texas as to whether an appellate court has "fact" jurisdiction to review whether a finding of competency is against the greater weight and preponderance of the evidence. In *Ex Parte Watson,* 606 S.W.2d 902 (Tex. Crim. App. 1980), en banc, the Texas Court of Criminal Appeals wrote:

> We are initially confronted with the question whether this court is empowered to consider Petitioner's claim [that he established his incompetency by a preponderance of the evidence]. In *White v. State,* 591 S.W.2d 851 (Tex. Crim. App. 1979), it was held that, unlike the courts of civil appeals,[1] this court does not have fact jurisdiction." See also *Martin v. State,* 605 S.W.2d 259 (Tex. Crim. App. 1980).

However, in *Schuessler v. State,* 647 S.W.2d 743 (Tex. App.—El Paso 1983), Pet. for Discretionary Rev. granted June 22, 1983, the Texas Court of Appeals for the Eighth Supreme Judicial District overturned a jury verdict that rejected the defendant's insanity plea (an

1. The former Texas Court of Civil Appeals has since been renamed the Texas Court of Appeals, and the Texas Legislature has since made the Texas Court of Appeals an intermediary appellate court with jurisdiction in both civil and criminal appeals. The Texas Court of Criminal Appeals remains the court of highest criminal resort. This intermediary appellate court procedure became effective September 1, 1981.

affirmative defense in Texas), based upon the fact that the verdict was contrary to the great weight and preponderance of the evidence. As noted, the Texas Court of Crimnial Appeals has granted discretionry review of that decision and the case is still on submission before that court of highest resort. It may well be that the high Texas Court questions the propriety of that exercise of "fact" jurisdiction, something that *Jackson* mandates as a matter of federal due process.

Petitioner's Due Process and equal protection ground comes down to this: The evidence adduced at the competency hearing was such that no rational trier of fact could have found against Petitioner's contention of incompetence. This is the standard of review commensurate with Due Process that has been established by the Supreme Court in *Jackson v. Virginia, supra,* and Petitioner has yet to have this standard applied to the record in this case. Petitioner respectfully says that Due Process entitles him to the type of "hard look" at the facts that *Jackson* requires.

The Improper Remarks by the Prosecutor

Texas law well recognizes that the guilt or innocence of a defendant is not an issue in a competency hearing, and it is improper to make reference to the details of any given offense. See generally *Calloway v. State,* 594 S.W.2d 440 (Tex. Crim. App. 1980); *Ex Parte Long,* 564 S.W.2d 760 (Tex. Crim. App. 1978) en banc; *Ex Parte Hagans,* 558 S.W.2d 457 (Tex. Crim. App. 1977). In spite of this rule, there were many improper references to the fact that there had been a prior trial. The most blatant reference to that fact, however, occurred when the prosecutor was questioning a defense

psychiatrist, Dr. Houser. The exact sequence is as follows:

"Q. [Prosecutor] Doctor, one who has been, assume this to be true, *just convicted of murder, with a substantial punishment* would—

MR. DeGUERIN [Defense Counsel]: Just a moment, Your Honor. That is absolutely improper. I object to that statement.

THE COURT: I sustain.

MR. DeGUERIN: And ask that it be struck from the record.

MR. WALKER: Well, sir, I will just rephrase it.

MR. DeGUERIN: Just a moment. I ask that it be struck from the record.

THE COURT: Step inside the side room, just a moment.

* * *

THE COURT: This is an area that I don't want argued in the presence of the jury.

MR. WALKER: I am entitled—

MR. DeGUERIN: Judge, the cases are plentiful with the holding that the procedure is not to allow the State to bring this before the jury, the facts of the offense, the evidence, or argument, or the verdict or anything remotely associated with it or him saying it was such a terrible case or what should happen and he has injected that he was convicted of murder and that he received a substantial sentence. I think this is highly improper and that the cases are, all say that it is improper to do that and I am shocked.

MR. WALKER: The basis is malingering and to go into the issue is not a violation and this de-

fendant's propensity to malinger, whether or not the fact that there was substantial punishment assessed against this defendant is proper area of inquiry from the standpoint of whether or not this man is malingering that is an intergral part of the State's case.

MR. DeGUERIN: I can show the Court the cases.

THE COURT: I will not allow it to be brought in, the amount of the sentence, the amount of punishment in regards to this matter.

MR. DeGUERIN: Or even the facts of the conviction I think it is improper and the cases say that.

THE COURT: I am in agreement with that.

MR. WALKER: Let me ask you this, how about facing a substantial punishment. Obviously that is before the jury, murder. There is not a juror up that don't know that murder bears a substantial punishment.

THE COURT: I don't have any objection to that.

MR. DeGUERIN: Which is a whole lot different from what you said.

MR. WALKER: What did I say?

MR. DeGUERIN: You said he had been convicted and assessed a substantial punishment and I think that is highly improper, and I object to it and my objection has been sustained and I move to strike it from the record and instruct the jury that it is not to be considered for any purpose whatsoever, and further I know the injection of that is something they could not forget and any instruction, no matter how carefully worded, would be insufficient and I move for a mistrial on the basis that such instruction could not possibly cure the error

for that purposeful injection of that highly inflammatory information.

THE COURT: Your motion for mistrial denied." "R.XIV-2145-48"

Due process and equal protection of the laws requires that a jury be free from evidence that would inhibit its ability to decide fairly and impartially the narrow issue of competency to stand trial. Stated another way, it would be offensive to the Equal Protection clause if the atmosphere and evidence at the competency hearing varies depending on whether the hearing was had pre-trial or post-verdict.

In the case at bar, the State's attorney rang a bell that could not be unrung. Rather than being able to fairly and impartially make a decision on the very narrow issue of competency, the jury's task was cluttered with the obvious "side issue" that a verdict of incompetency would undo Petitioner's conviction and cost all of the taxpayers, including themselves, more time and money in the event of a retrial. In other words, the minds of the jurors were so stirred up against Petitioner that they could not exercise "calm judgment" on the question of retrospective competency.

As a final note, in *Drope v. Missouri,* 420 U.S. 162, 43 L.Ed.2d 103, 95 S.Ct. 896 (1975), as well as in *Pate v. Robinson, supra,* the Supreme Court highlights and cautions against Due Process pitfalls that can be encountered in retroactive competency hearings. While the prolonged passage of time is certainly one circumstance that would infect Due Process rights, Petitioner respectfully says that a retrospective competency hearing, in which the jury is told that the defendant has already

been convicted and sentenced to life imprisonment, implicates Due Process in an even more compelling way. It is undisputed and, in fact, the opinion by the Court of Appeals at "Appendix A" admits that the jury was privy to this improper, prejudicial evidence.

The trial court erroneously refused Petitioner's Motion for Mistrial following the ill-advised remark by the prosecutor. Petitioner respectfully says that the Court of Appeals "waiver" analysis is unsatisfactory. The remark was manifestly improper and amounted to a direct denial of due process occasioned by the conduct of a State official.

Appellant's Due Process and Equal Protection contentions warrant further consideration by the Supreme Court.

CONCLUSION

For these reasons, Petitioner respectfully prays that this Honorable Court will grant this his Application for Writ of Certiorari and that he will be given the opportunity to further brief and argue the issues raised herein.

Respectfully submitted,

DEGUERIN & DICKSON

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Attorneys for Petitioner

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WILLIAM ROBERT PARKER,
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v.

THE STATE OF TEXAS,
Respondent.

CERTIFICATE OF SERVICE

LEWIS DICKSON, a member of the Bar of this Court, certifies that pursuant to Rule 28, he served the preceding Petition for Writ of Certiorari by enclosing a copy of this document in envelopes, first class postage prepaid and addressed to:

Mr. John S. Walker
District Attorney
Panola County, Texas
209 Austin Street
Center, Texas 75935

State Prosecuting Attorney
P. O. Box 12405
Austin, Texas 78711

and depositing the envelopes in the United States Post Office, San Jacinto Station, Houston, Texas 77002, on July 9, 1984, and further certifies that all parties required to be served have been served.

LEWIS DICKSON

APPENDIX A

William Robert PARKER, aka Billy Bob Parker,
Appellant,

v.

The STATE of Texas, Appellee.

No. 6-81-121-CR.

Court of Appeals of Texas,
Texarkana.

Nov. 9, 1983.

Rehearing Denied Dec. 20, 1983.

Petition for Discretionry Review
Pending Jan. 20, 1984.

Defendant was convicted in the 71st District Court, Harrison County, Bennie Boles, J., of murder, and he appealed. The Court of Appeals, Cornelius, C.J., held that: (1) evidence, though highly conflicting, was sufficient to warrant finding that defendant was competent to stand trial; (2) trial court did not err in refusing to grant mistrial when faced with evidence of defendant's incompetency; (3) prosecutor's reference to defendant's conviction in post-verdict competency hearing was not prejudicial; (4) court properly submitted charge at post-verdict competency hearing inquiring whether defendant was incompetent at time he stood trial; and (5) it was unecessary to charge on right to strike first when jury had been instructed on self-defense.

Judgment affirmed.

Dick DeGuerin, Houston, for appellant.

John S. Walker, Center, for appellee.

CORNELIUS, Chief Justice.

William Robert Parker was convicted of murder and sentenced to life imprisonment. He appeals, contending the jury finding that he was competent to stand trial was against the great weight and preponderance of the evidence, the trial court erred in failing to grant a mistrial, the prosecutor made inflammatory remarks, the issue of competency was not properly submitted to the jury, and he was erroneously denied a requested jury charge. We overrule these contentions and affirm the judgment.

Parker was charged with the murder of Shane Caskey. During the trial defense counsel suggested to the trial judge that Parker was suffering from hallucinations and delusions and was not competent to stand trial. The judge declined to abate the trial but held a competency hearing, before a separate jury, after a verdict of guilty was returned but before sentencing. After presentation of testimony from both Parker and the State the jury found that Parker was presently competent and was also competent at the time of the trial on the merits.

[1, 2] We first must decide if the finding of competency was against the great weight and preponderance of the evidence. A competency hearing is civil in nature, so we apply the civil test and weigh all the evidence to determine if the jury finding was so against the great weight and preponderance of the evidence as to be manifestly unjust. *Ex Parte Watson*, 606 S.W.2d 902 (Tex. Cr. App.

1980); *White v. State,* 591 S.W.2d 851 (Tex. Cr. App. 1979). When competency is an issue, the burden of proof is on the defendant to prove by a preponderance of the evidence, (*White v. State,* supra; Tex. Code Crim. Proc. Ann. art. 46.02, § 1(b) (Vernon 1979)), that he does not have sufficient ability to consult with his lawyer with a reasonable degree of rational understanding, and that he has no rational or factual understanding of the proceedings against him. *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); *Ex Parte Long,* 564 S.W.2d 760 (Tex. Cr. App. 1978).

A great amount of evidence was adduced on the question of competency. Both parties produced expert medical witnesses, as well as laymen who know Parker and who had observed his actions sufficiently to form opinions concerning his competency. The evidence was highly conflicting. Parker's witnesses indicated he had a history of conduct consistent with paranoid schizophrenia, and that he suffered from delusions and a persecution complex. Although his medical witnesses never actually diagnosed Parker as having schizophrenia at the times in question, they testified that on earlier psychological tests he scored similarly to people tending to have that malady. The State's evidence tended to show that Parker was not psychotic but was malingering, and that he was sufficiently competent to understand the proceedings against him and consult with his lawyer in presenting his defense. A State medical witness testified that a person can suffer from schizophrenia and still be legally competent to stand trial. There was also evidence that Parker had a history of using hallucinogenic drugs which could account for his delusions.

[3, 4] It is the jurors' province to determine the credibility of the witnesses and the weight to be given their testimony. *Ex Parte Harris,* 618 S.W.2d 369 (Tex. Cr. App. 1981); *Ex Parte Watson,* supra. They may accept or reject any evidence and may believe lay testimony over that of medical experts. *White v. Estelle,* 669 F.2d 973 (5th Cir. 1982). Considering the abundance of conflicting testimony here we cannot say the finding of competency is against the great weight and preponderance of the evidence.

[5] Parker also contends the trial court erred in refusing to grant a mistrial when faced with evidence of incompetency. Tex. Code Crim. Proc. Ann. art. 46.02, § 4(c) (Vernon 1979) provides that a mistrial shall be granted if the defendant is found incompetent at a hearing. Parker was found to have been competent at the time of the trial. There was no error.

During the competency hearing the prosecutor asked a witness: "Doctor, one who has been, assume this to be true, just convicted of murder, with a substantial punishment would—", at which time defense counsel objected. Parker argues such a question was inflammatory and prejudiced the jury to the extent that a reversal is required.

[6-8] The guilt or innocence of the defendant is not in issue at the competency hearing. It is improper to offer evidence of the offense itself or to suggest that the defendant should be found competent because of the seriousness of the crime. *Callaway v. State,* 594 S.W.2d 440 (Tex. Cr. App. 1980); *Ex Parte Hagans,* 558 S.W. 2d 457 (Tex. Cr. App. 1977). But not every mention of the crime will be prejudicial. The statement must be so inflammatory and misleading that it prevents a fair

determination of the question of competency and denies the defendant due process of law. *Brandon v. State,* 599 S.W.2d 567 (Tex. Cr. App. 1979), *vacated on other grounds,* 453 U.S. 902, 101 S.Ct. 3134, 69 L.Ed.2d 988 (1981); *Callaway v. State,* supra. In this case there was considerable evidence before the jury, without objection, showing that Parker had been charged with and tried for murdering his brother-in-law. Under the circumstances, we do not find the question so inflammatory as to prejudice the jury, particularly in light of the fact that an objection to it was sustained and the jury instructed to disregard it.

[9] The trial court submitted, over Parker's objection, an issue asking if the jury found:

> by a preponderance of the evidence that the defendant, William Robert Parker, was incompetent during February 23, 1981 through March 5, 1981, to stand trial for the offense charged against him?

and if they found:

> by a preponderance of the evidence that the defendant, William Robert Parker, is presently incompetent to stand trial for the offense charged against him?

The jury answered "No" to both questions. Parker contends the court erred in refusing to limit the issue to present incompetency. See Tex. Code Crim. Proc. Ann. art. 46.02. It is proper to submit a charge inquiring whether the defendant was incompetent at the time he stood trial. *Brandon v. State,* supra; *Caballero v. State,* 587 S.W.2d 741 (Tex. Cr. App. 1979). We can perceive no harm to Parker as a result of the form used. The jury answered "No" to both questions, and there is no showing it was misled to Parker's prejudice.

[10] The trial court refused Parker's requested issue, in conjunction with his claim of self-defense, on his right to strike first rather than wait for the deceased to strike the first blow. It is unnecessary to charge on the right to strike first when the jury has been instructed on self-defense. *De La Cruz v. State*, 490 S.W.2d 839 (Tex. Cr. App. 1973).

We find no reversible error. The judgment is affirmed.

APPENDIX B

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 0136-84
STYLE: Parker, William Robert

May 9, 1984

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

/s/ Thomas Lowe, Clerk

Court of Criminal Appeals
P.O. Box 12308 Capital Station
Austin, Texas 78711

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APPENDIX C

DEFENDANT'S EVIDENCE

The Defendant presented testimony in support of his competency contention from six doctors, three lay witnesses and defense counsel. The Defendant will present the review of this evidence in chronological fashion, and not necessarily the order in which it occurred during the course of the trial.

Mrs. Auline Bailey, the Defendant's aunt by marriage, testified that she had observed the Defendant most of his natural life. "R-XIV-2288-2290" Mrs. Bailey has a doctorate degree in education, has been a teacher all of her life except for when she was Dean of Women at Baylor University for a period of ten years. She testified that throughout the Defendant's life she observed numerous instances of abnormal, if not bizarre conduct. "R-XIV-2291" Mrs. Bailey testified that the Defendant could not as a youth, follow or obey the most simple of directions necessary to play childhood games. At times the Defendant would become extremely violent; during one of these instances he was wielding a hatchet and chased the other children around the yard and into the house. "R-XIV-2294" On other occasions the Defendant would walk down the middle of the road daring various trucks and automobiles to hit him. "R-XIV-2296" In essence, Mrs. Bailey testified that she thought the Defendant certainly suffered some form of mental disorder and evidenced that throughout his entire life.

The Defendant's brother, Frank Allen Parker, also testified during the competency hearing "R-XVIII-3095-3114" and reiterated the abnormal conduct observed by

the Defendant's aunt. Frank Parker testified that on numerous occasions the Defendant would sit on top of his house on the roof with a firearm, complaining that people were after him. Sometimes he would hide in a tree, or hide within the walls of his house in a secret panel. On other occasions the Defendant would sit on tops of rooves in downtown Tenaha and observe the people on the street for hours on end.

Mrs. Franklin Parker, the mother of the Defendant, also testified "R-VIX-2321-2366" and verified the bizarre behavior pattern previously ascribed. In addition, she gave several instances of paranoid conduct by the Defendant while he was incarcerated awaiting trial in the instant case, including such instances as the Sheriff was taping all their interviews, the Sheriff was trying to poison his food by putting Calamine lotion in it, the Sheriff was screening all of his waste that was being flushed down the commode in his cell.

The first professional suspicion of abnormalicy occurred in 1975 when the family physician, Dr. Vernon Polk, decided to refer the Defendant for further examination at a hospital in Shreveport, Louisiana. "R-XVIII-3048-3049" Because Dr. Polk, a general practitioner in Center, Texas, suspected psychiatric problems of the Defendant, he was referred to a Dr. Woodfin Wilson at Schumpert Hospital in Shreveport, Louisiana. After Dr. Wilson examined the Defendant in August, 1975 he decided to refer the Defendant to a psychiatrist by the name of Dr. Marceau also located at Schumpert Hospital. "R-VXIII-3145-3150" It was the consensus of opinion between Drs. Wilson and Marceau that the Defendant in 1975 was suffering from paranoid schizophrenia. "R-XVIII-3155" Additionally,

Dr. Vernon Polk testified that if the Defendant were acting as in 1975, he would doubt that the Defendant would be competent to stand trial. "R-XVIII-3058"

The testimony of Drs. Polk and Wilson, together with the diagnosis of Dr. Marceau, is particularly important due to the fact that it shows early indication of the mental disease, as well as demonstrating a conforming diagnosis at a time when the Defendant was not laboring under any criminal process.

In July, 1979 the Defendant was examined by a psychologist with the Houser Clinic at Houston, Texas by the name of Dr. Ken Vincent. Dr. Vincent testified that he first saw the Defendant at the Houston International Hospital in July of 1979 upon referral by a psychiatrist by the name of Dr. Merck. "R-XII-1670" Dr. Vincent administered the following tests, to wit: Amands I.Q. Test, Bender Visual Motor Gestalt Test, the Holsom Ink Blot Technique Test, the Lovinger Sentence Completion Test, and the Minnesota Multiphrasic Personality Inventory, hereinafter referred to as MMPI. That based upon the tests which were administered to him, and his clinical interviews the psychologist, 1979, diagnosed the Defendant as psychotic, schizoid-affective or paranoid. "R-VII-1694" Moreover, the doctor testified that if he were suffering from the same psychotic illness at the time of trial, that he was in 1979, it would affect any interpersonal relationship and necessarily affect his competence to stand trial. "R-VII-1703"

Dr. Thomas Merck, the psychiatrist who referred the Defendant in July, 1979, also testified that he had examined the Defendant in 1979 and recommended that the Defendant continue to receive counseling and therapy.

His diagnosis in 1979 was substance abuse, depressive/ neurosis, possibly schizophrenic. "R-XII-1774" The doctor also testified that in 1979 the Defendant manifested symptoms of depression, hallucinations, and delusive thoughts. "R-XII-1776" Against the doctor's advice the Defendant discontinued therapy and treatment. "R-XII-1772"

Dr. Merck next saw the Defendant in February, 1981, immediately prior to the trial, and on March 1, 1981 during the actual trial itself. At that time Dr. Merck made a diagnosis of depressive psychosis, paranoid-delusional, possibly paranoid schizophrenia. "R-XII-1778" The doctor testified that during this time the Defendant was extremely depressed and actively hallucinating. He testified that because of this the Defendant was not competent to stand trial in February-March of 1982, in that he did not have the ability to consult with his lawyer with a reasonable degree of rational understanding, nor did he have a rational as well as factual understanding of the proceedings against him. The doctor testified that it was his opinion that the Defendant was still not competent at the time of the competency hearing within the meaning or definition of that term. "R-XII-1782, 1840-1843"

Dr. Ray Hayes, a clinical psychologist in Houston, Texas employed by the Texas Research Institute of Mental Sciences, and also on the Texas State Board of Examiners "R-XIII-1874-1878" testified in support of the Defendant. Dr. Hayes saw the Defendant during the summer of 1981, between the time of trial and the time of the competency hearing. "R-XIII-1882" In addition to conducting a clinical interview, Dr. Hayes administered

the following tests: Rorschoch Ink Blot, Bender Visual Motor Gestalt, and MMPI. Dr. Hayes testified that both the MMPI given in 1979 by Dr. Vincent, and the MMPI that he administered in 1981, demonstrated the same personality of a paranoid schizophrenic. "R-XIV-1896-1907" Moreover, Dr. Hayes testified, in no uncertain terms, that the tests were valid as evidenced by a built in scale which would detect if the individual taking the examination were attempting to take it or lie. Dr. Hayes testified that the Defendant was delusional, he would not have been able to communicate with his lawyer during the trial, and was not competent within the legal definition of that term. "R-XIV-1907-1915"

Dr. Ronald Houser, a psychiatrist in Houston, Texas also testified on behalf of the Defendant. Dr. Houser is a practicing psychiatrist at the Houser Clinic in Houston, Texas founded by his father in 1940. "R-XIII-2070-2072" Dr. Houser first saw the Defendant in June, 1981, and has seen the Defendant on six different occasions between that date and the time of the hearing, September, 1981. Each of these interviews lasted from two to four hours. It was Dr. Houser's opinion, based on all of the evidence, including the medical history of the Defendant as well as all testing done by Dr. Vincent and Dr. Hayes, that the Defendant was a paranoid schizophrenic. "R-XIII-2076" That the Defendant was delusional, was out of touch with reality and could not consult with his lawyer in a rational manner, nor could he rationally understand to any reasonable degree the proceedings against him. "R-VIII-2080-2088" The doctor related several instances where the Defendant was delusional, thinking that the deceased was sitting in the back of the courtroom, that people were putting hexes on him and he was putting

hexes back on people, the Sheriff was attempting to poison his food, etc. "R-XIII-2080-2082"

The Defendant also presented the testimony of one Dr. Robert Maulsby an electroencephalographer for twenty years. Dr. Maulsby was also employed at Texas Research Institute for Mental Sciences. Dr. Maulsby testified that he examined the results of an E.E.G. administered by Rusk State Hospital and saw the possibility of brain damage in it. "R-XII-1859" Dr. Maulsby requested that a second E.E.G. be conducted, however, to his knowledge one was never done. "R-XII-1860"

In addition to all of the foregoing the Defendant's attorney, Dick DeGuerin, testified that he was unable to communicate with the Defendant. That during the course of the trial the Defendant began hallucinating, and as a result of this, he, defense counsel, requested Dr. Merck to journey to Panola County and re-examine the Defendant to determine his competency. It was pursuant to that examination that the defense counsel first made his request for a competency hearing. "R-XV-2377-2380"

STATE'S EVIDENCE

The State presented testimony from one psychologist and one psychiatrist, both of whom acted in concert at Rusk State Hospital. The first to testify was Dr. Arthur Vickland, the psychologist. Dr. Vickland related that he had opportunities to observe the Defendant on two occasions. The first in March of 1981 and again shortly before the court proceeding. "R-XVII-2745, 2756" On the first occasion the Defendant was very uncooperative, and very suspicious of the people at Rusk Hospital. Based on his observations Dr. Vickland decided that he, the

Defendant, was competent. During the second visit Dr. Vickland had the benefit of the following tests, to wit: the Sentence Completion Test, the Draw a Figure Test, and an MMPI. "R-XVII-2760-2770" From the tests administered, and despite the fact that the MMPI was very similar to the two previously administered, Dr. Vickland concluded that the Defendant was competent within the meaning of the legal definition. "R-XVII-2785"

On cross-examination, Dr. Vickland was so impeached that his testimony should be given little credibility. First, the defense counsel demonstrated that Dr. Vickland did not obtain his Ph.D. until 1976. That he obtained his Ph.D. in educational psychology, and as such did not take any courses in psychological testing. "R-XVII-2790-2797" Moreover, Dr. Vickland admitted that he did not know any of the psychiatric history of the Defendant, including the fact that in 1975 the Defendant had been diagnosed as a paranoid schizophrenic. In fact, Dr. Vickland admitted that part of his report and testimony in criticizing the previous doctors' testimony concerning their diagnosis of paranoid schizophrenia, relied heavily on the misapprehension that there was no history of mental illness of the Defendant. "R-XVII-2805-2806" When questioned about the MMPI that was administered,

The other expert to testify on behalf of the State was Dr. James Hunter, a psychiatrist at Rusk State Hospital. Dr. Hunter saw the Defendant during his visits at Rusk in March of 1981 and August, 1981 "R-XVII-2887" Dr Hunter testified that the Defendant was uncooperative in March and was somewhat frightened and agitated. "R-XVII-2889" A problem which is admittedly not surprising if in fact the Defendant was a paranoid schizo-

phrenic. Basically, it was Dr. Hunter's opinion that the Defendant was not psychotic, but was competent to stand trial now and at the time he was actually tried in February-March 1981.

On cross-examination defense counsel pointed out that Dr. Hunter never performed a residency in psychiatry, and has never been board certified by the state of Texas. Dr. Hunter also felt, since he was trying to determine present competency, that it was not important to have the psychiatric history of the Defendant in reaching his diagnosis. "R-XVII-2937" However, in contrast to his testimony, Dr. Hunter admitted that his own report stated that the absence of a prior psychiatric history makes the previous doctors' testimony of paranoid schizophrenia suspect. "R-XVII-2937" It was pointed out to Dr. Hunter that in 1975, and prior to any difficulties with the law, two doctors in Shreveport, Louisiana diagnosed the Defendant as having paranoid schizophrenia. When faced with the obvious conflict, Dr. Hunter reverted to his *feelings* that the psychiatric history was simply not important. In fact it was pointed out on cross-examination that Dr. Hunter apparently rejects anything that is inconsistent with his diagnosis of competency. By way of illustration, during direct examination the prosecutor elicited testimony of a diagnostic decision tree found in a psychiatric reference book known as a DSM-3. That in using the diagnostic criteria the psychiatrist concluded that the Defendant was not suffering from any psychosis. However, upon cross-examination concerning his utilization of the diagnostic tree the following questions and responses were asked and given by defense counsel and the doctor:

Q: [Defense Counsel] Okay, at any rate, let's go over a couple of your decisions on that decision tree very briefly. All right, the first little box says irrational anxiety or avoidance behaviors of predominant clinical features, you found that?

A: [Dr. Hunter] I felt so, yes.

Q: And so then you go to the next step, is there a known organic basis or etiology?

A: I felt not at that time.

Q: And of course you didn't have the EEG at that time?

A: No, but that would not have made a difference.

Q: All right, so you go to the next one, you answer that no and here is the one I want to question you about, Doctor, because that is the decision that seems to make a lot of difference. Psychotic features, were there psychotic features and you have to answer that no and go on to this diagnosis you got to or if you answered it yes, Doctor, you then go to the psychotic deciison tree, don't you?

A: If I answered it yes but I answered it no.

Q: I know you answered it no. And I know that every time I give you an opportunity to say that you answered no, you will say no. We know that you answered it no.

A: All right.

Q: I am calling into question that decision, Doctor by this cross examination. Now, if you had answered it yes, it is clear that the diagnostic decision tree would tell you to go to the psychotic decision tree, correct?

Q: And that is the one, let me show you, we have a blow up of that one, so you can compare it with,

to make sure this is what it tells you to do. If you answer that question are there known psychotic, what is it, psychotic features, if you answer that yes then you go to this psychotic feature's tree, don't you?

A: Yes.

Q: This one?

A: Right.

Q: All right, now, but you answered it no.

A: Right.

Q: Now, they don't say there whether your opinion is involved as to whether there are psychotic features is there, it just says, are there psychotic features?

A: Again that is a judgment as to whether or not there are psychotic features.

Q: Now, so we can review with the jury, what psychotic features are, psychotic features are delusions, aren't they?

A: Yes.

Q: Hallucinations?

A: Yes.

Q: Marked loosening of association?

A: Right.

Q: Poverty of content of thought?

A: Right.

Q: Markedly illogical thinking?

A: Correct.

Q: Behavior that is bizarre?

A: Yes.

Q: Those are psychotic features, aren't they?

A: Right.

Q: Now, there were reports and you had a history of Billy Bob Parker having delusions, right?

A: Yes.

Q: But you discarded that?

A: I considered that.

Q: But you discarded it eventually?

A: Eventually, yes.

Q: There were reports and you had a history of Billy Bob Parker having hallucinations, weren't there?

A: Correct.

Q: He told you he had hallucinations?

A: That is correct.

Q: The nurses on the ward reported hallucinations, correct?

A: He claimed that, yes, sir.

Q: But you discarded that?

A: Right.

Q: There were reports and you had a history of loosening of associations, correct.

A: There were source of some reports, yes.

Q: But you discarded that?

A: He didn't demonstrate that when he was at the hospital.

Q: And there were reports and there was history of poverty and content of thought, weren't there?

A: There probably was.

Q: But you discarded that?

A: Right.

Q: And there was history and even some that you found marked illogical thinking, correct?

A: Okay.

Q: You wrote your report, insight may be impaired, right?

A: Right.

Q: But you discarded that?

A: That is not necessarily illogical, okay.

Q: But you discarded it anyway?

A: Right.

Q: And there was history even from Mr. Walker of behavior that is bizarre, correct?

A: Yes.

Q: And you discarded that?

A: Right.

Q: If you had not discarded even one of those things, Doctor, that decision tree would have required you instead of going down to this generalized anxiety disorder, to go to this psychotic features decision tree, wouldn't it?

A: And—

Q: Step Number 2.

A: And it would have led me to another diagnosis.

Q: You have been wrong before, haven't you, Doctor?

A: Sure. "R-XVII-3029-34"

In addition to this expert testimony the State presented the lay testimony of a nurse at Rusk who felt as though the Defendant was competent, three newspaper reporters who had observed the Defendant during the trial in Febarury-March 1981 and stated that the Defendant appeared, by visual observation only, normal. Although the newsmen testified that the Defendant conversed with his counsel, they did not know what was said. In addition thereto the State also presented the testimony of the Sheriff and several of the people that worked for the Sheriff, including two of the jailers, who testified that they thought the Defendant was normal.